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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/613,861	07/03/2003	David V. Foster	006943.00136	4341
66811 7590 03/28/2007 BANNER & WITCOFF, LTD. and ATTORNEYS FOR CLIENT NO. 006943 10 SOUTH WACKER DR. SUITE 3000 CHICAGO, IL 60606			EXAMINER PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/28/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/613,861	<b>Applicant(s)</b> FOSTER ET AL.	
	<b>Examiner</b> Helen F. Pratt	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 26 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

Claims 3-4 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 3 and 4 are indefinite in the use of the phrase "vitamin C component comprises from about 6mg to about 500 mg of the composition". It is not seen how the vitamin can comprise that amount of the composition because the "composition is an oatmeal composition. Applicants may mean "wherein said triple encapsulated vitamin C component comprises from about 6 mg to about 500 mg of vitamin C. ".

## **MISCELLANEOUS**

In claim 7, "acerbate" should be "asorbate".

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-9, 15, 20-35, 41-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aterno et al. (2,811,483) in view of Hansa et al. (6,472,004) in view of the admitted state of the prior art.

Aterno et al. disclose that it is known to mix beadlets of vitamins with cereals and that it is known to coat vitamins and minerals with gums and oil, and to use up to 10-

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50 layers of coatings (col. 1, lines 40-53, col. 2, lines 21-73, col. 3, lines 1-20, col. 6, lines 3-15, col. 4, lines 10-23). Coating of vitamins and minerals is considered to read on encapsulation, because the vitamins are encapsulated in the coating. Oatmeal is also an extremely well known product as in QUAKER OATS (Trademark). Claim 1 differs from the reference in the use of one coating of fat and one coating of a polymer to make a triple encapsulated vitamin C (TEVC). Aterno discloses that it is known to use gums (polymers) and oils to seal and protect vitamins from the air and moisture. Suitable sealing materials are hydroxy ethyl cellulose and peanut oil (col. 2, lines 65-73). However, Applicants' specification discloses that the claimed TEVC is commercially available (page 8, 0027). Also, Hansa et al. disclose an uncooked oat product coated with a nutrient coating, which can be vitamin C (abstract, and col. 4, lines 12-30, col. 9, lines 40-66). Therefore, it would have been obvious to use the known coated vitamins of the admitted state of the art which are commercially available in place of the coated vitamins of Aterno et al. which contains the right ingredients and to mix the vitamins with oats which are known as in Quaker oats which are specifically a cereal as taught by Aterno.

Claim 2 further requires that the composition contain 60-97.5% processed oats. Aterno et al. disclose that the coated vitamins and minerals are sprinkled on breakfast cereal. Certainly only a sprinkling would leave the amount of oats at within the claimed range (col. 1, lines 45-54).

Claim 3 further requires that the composition contain particular amounts of coated vitamin C. However, it is seen that it would have been within the skill of the

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ordinary worker to use whatever amount of coated vitamins was required to achieve a particular amounts of vitamins in the product. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a vitamin-containing product, properties such as degree of fortification are important. It appears that the precise ingredients as well as their proportions affects the degree of fortification of the product, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to use particular amounts of vitamins in the composition.

Claim 4 further requires the TEVC is ascorbic acid and claim 6 that it is an alkali metal salt, claim 7, that it is sodium ascorbate, and claims 8 and 9, potassium and calcium ascorbate. Aterno et al. disclose that it is known to use sodium and calcium ascorbate (col. 6, lines 10-15). Nothing new is seen in the use of potassium instead of calcium, as potassium is well known as a mineral, and it would have been obvious to use the mineral if required as it can be easily substituted for calcium. Therefore, it would have been obvious to use known forms of ascorbate in the composition of the combined references.

Claim 15 further requires that the oatmeal composition contain the TEVC. The other ingredients may or may not be in the composition, such as a sweetener and salt since the amounts include zero amounts. Hansa discloses the use of other vitamins and minerals, (col. 4, lines 13-29). The coating also contains a sweetener (col. 4, lines

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60-70). Therefore, it would have been obvious to use known ingredients in the claimed composition.

The limitations of claims 20-22 have been discussed above and are obvious for those reasons:

Claims 23 -29 further require particular amounts of ingredients. However, as sweetener and salt are well known ingredients in cooking, nothing new is seen in adding them in particular amounts for their known functions. Therefore, it would have been obvious to use known ingredients in known amounts.

Claim 30 further requires that the vitamin and mineral mixture exclude vitamin C. However, nothing new is seen in excluding vitamin C when the whole invention is to coating it. Therefore, it would have been obvious to exclude a vitamin, which needs to be treated differently such as by encapsulation.

The limitations of claims 31-35, 41-49 have been disclosed above and are obvious for those reasons.

Claims 10-14, 36-40, 50-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of JP55045601 and Anderson (2,410,417).

Claim 10 further requires that the vitamin C contain vegetable oil coating and an ethyl cellulose coating, and claim 11 that there are two vegetable coatings and one cellulose coating and claim 12 that the coating is between the vegetable oil coatings and claim 13 that the oil coatings are the same vegetable coating and claim 14 that they are different coatings. However, the specification as above discloses that the

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encapsulated vitamin C is known. In addition, JP '601 discloses that it is known to coat a drug with hardened oil and then ethyl cellulose. It would have been within the skill of the ordinary worker to use more than one coating of either component as the reference discloses that it is used to prolong disintegration. Aterno et al. disclose using more than one layer of coatings. Also, Anderson discloses that it is known to incorporate vitamins A and E in a hard fat before coating with ethyl cellulose (col. 7, lines 5-10, col. 8, lines 1-40). No patentable distinction is seen in using more than one oil at this time.

Therefore, it would have been obvious to use more than one layer of either component as shown by the references.

The limitations of 36-40 and 50-54 have been disclosed above and are obvious for those reasons.

Claims 16-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the claims above, and further in view of Hansa.

Claims 16 further requires flavorings, claim 17, binders, claim 18 inclusion pieces and claim 19 all three components. However, the claims can require zero amounts of these. The reference to Hansa discloses flavors, and binders (col. 4, lines 56-70). 0.5 grams of the desired nutrient can be added (col. 9, lines 40-50). The TEVC been shown above and is obvious for those reasons. Nothing new is seen in the addition of inclusions, which are common such as raisins in oatmeal. Therefore, it would have

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been obvious to add flavorings, binders and inclusions as shown by Hansa in the composition of the combined references.

### ARGUMENTS

Applicant's arguments with respect to claims 1-54 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 3-9-07

  
HELEN PRATT  
PRIMARY EXAMINER